

SUPREME COURT OF VERMONT

In re PRB Docket No. 2006-167, 2007 VT 50

925 A.2d 1026 (Vt. 2007) · No. No. 06-287 · Decided May 2, 2007

SUMMARY

The Vermont Supreme Court affirmed dismissal of a professional conduct complaint arising from an attorney's late filing of a criminal appeal. The Court held that, under the circumstances, the isolated negligent act did not violate Vermont Rule of Professional Conduct 1.3 because the error was remedied through post-conviction proceedings and the client's appellate rights were preserved.

CASE DETAILS

COURT	Supreme Court of Vermont
WRITING FOR THE COURT	Reiber, C.J.; Dooley, J.; Johnson, J.; Skoglund, J.; Burgess, J.
JURISDICTION	Vermont
DECIDED	May 2, 2007
DOCKET	No. 06-287
DISPOSITION	affirmed
PROCEDURAL POSTURE	Disciplinary Counsel appealed the Professional Responsibility Board's dismissal of a professional-conduct complaint after the Hearing Panel found that respondent's missed appellate filing deadline did not violate Vermont Rule of Professional Conduct 1.3.
STANDARD OF REVIEW	The Supreme Court makes its own decisions regarding attorney discipline while according deference to the Board's findings and the Hearing Panel's recommendation. The Court accepts the Panel's factual findings unless clearly erroneous and independently determines the appropriate sanction.
PRECEDENTIAL VALUE	Published Vermont Supreme Court opinion; precedential.
PARTIES	Disciplinary Counsel v. Respondent

TOPICS

- appellate procedure
- post-conviction relief
- standard of review
- criminal procedure

PRACTICE AREAS

legal ethics

attorney discipline

professional responsibility

criminal appellate procedure

post-conviction relief

QUESTIONS PRESENTED

1. Whether respondent's single, isolated failure to file a notice of appeal by the deadline constituted a violation of Vermont Rule of Professional Conduct 1.3.
2. Whether the Professional Responsibility Board properly dismissed the disciplinary complaint after finding that respondent's negligence was remedied and did not warrant discipline.

HOLDINGS

1. A single isolated act of negligence, without additional conduct compounding the error and absent injury or other aggravating factors, does not necessarily constitute a failure to act with reasonable diligence and promptness under Rule 1.3. On the facts presented, respondent's missed filing deadline did not constitute misconduct.
2. The Supreme Court defers to the Board's findings of fact unless clearly erroneous and gives deference to the Hearing Panel's recommendation, but independently determines the appropriate attorney-discipline sanction.

KEY QUOTATIONS

"A single isolated act of negligence without any further acts compounding the error does not breach the standard of Rule 1.3." (925 A.2d at 1028)

"However, absent injury or other factors, a single mistake does not show a lack of reasonable diligence or promptness." (925 A.2d at 1029)

FACTUAL BACKGROUND

Respondent represented a criminal defendant and agreed to file a notice of appeal, but filed it five days after the deadline, resulting in dismissal of the appeal as untimely. The client's post-conviction proceeding resulted in an additional thirty-day period to file a new notice of appeal, and the client ultimately received appellate review, although the appeal was denied on the merits. Respondent cooperated with the disciplinary process, admitted the error, and took remedial action.

PROCEDURAL HISTORY

Respondent filed a client's notice of appeal five days late, and the Supreme Court dismissed the appeal as untimely. The client later obtained post-conviction relief allowing a new notice of appeal, and the appeal was ultimately denied on the merits. After the client filed a disciplinary complaint, respondent admitted the misconduct and stipulated with Disciplinary Counsel to a Rule 1.3 violation and private admonition, but the Hearing Panel found no violation and dismissed the complaint; the Board affirmed, and Disciplinary Counsel appealed.

DISPOSITION

affirmed

CASES CITED

- In re Keitel, 172 Vt. 537, 538, 772 A.2d 507, 509 (2001) (mem.)
- In re Blais, 174 Vt. 628, 629-31, 817 A.2d 1266, 1269-70 (2002) (mem.)
- In re Berk, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991) (per curiam)
- In re PRB File No. 2005.202, Decision No. 81 (Nov. 22, 2005)
- In re PRB File No. 2005.191, Decision No. 90 (Mar. 17, 2006)
- In re PRB File No. 2004.062, Decision No. 68 (July 3, 2004)
- In re PRB File No. 2002.219, Decision No. 57 (July 7, 2003)
- In re PRB File No. 2003.183, Decision No. 56 (June 9, 2003)
- In re Furlan, Decision No. 65 (May 5, 2004)

OPINION

PER CURIAM.

925 A.2d 1026 (2007) 2007 VT 50 In re PRB Docket No. 2006-167. No. 06-287. Supreme Court of Vermont. May 2, 2007. *1027 Present: REIBER, C.J., and DOOLEY, JOHNSON, SKOGLUND and BURGESS, JJ. ENTRY ORDER ¶ 1. Disciplinary Counsel appeals from a decision of the Professional Responsibility Board. Disciplinary Counsel and respondent entered into a stipulation which recommended the Hearing Panel find that respondent had violated Rule 1.3 of the Vermont Rules of Professional Conduct.

The parties further recommended that the Panel impose a private admonition as the appropriate sanction. The Hearing Panel found no violation of Rule 1.3, and dismissed the complaint. We affirm. ¶ 2. Respondent, admitted to the bar in 1985, represented a client in a criminal matter in district court. A jury convicted the client, and on November 29, 2000, the court imposed a sentence of incarceration.

The client asked respondent to file a notice of appeal on his behalf, and respondent agreed to do so. Respondent filed his client's notice of appeal five days after the deadline, and this Court dismissed the appeal as untimely. ¶ 3. Fewer than sixty days after the appeal was dismissed, the Prisoners' Rights Division of the Defender General's Office filed a petition for post-conviction relief in superior court on behalf of the client alleging that the respondent's untimely filing of the appeal constituted ineffective assistance of counsel.

Respondent cooperated in that proceeding as a potential witness. The parties settled the post-conviction relief case by providing the client an additional thirty days in which to file a new notice

of appeal. The client filed his second notice of appeal within that time, and this Court eventually denied the client's appeal on the merits. ¶ 4.

The client then filed a professional conduct complaint against respondent, alleging that he failed to act diligently and promptly in filing the original notice of appeal. The Vermont Rules of Professional Conduct require an attorney to act with reasonable diligence and promptness in representing a client. V.R.P.C. 1.3. Respondent cooperated with the disciplinary process, and admitted the alleged misconduct.

As noted above, Disciplinary Counsel and respondent entered into a stipulation in which respondent admitted misconduct and the parties recommended an agreed-upon sanction to the Hearing Panel of the Professional Responsibility Board.

The Panel held that missing the deadline to file a notice of appeal did not constitute a violation of Rule 1.3 in this case. Therefore, the Board dismissed the complaint. One member of the Board dissented. Disciplinary Counsel appealed. ¶ 5. "This Court makes its own decisions as to attorney discipline, according deference to the Board's findings."

In re Keitel, 172 Vt. 537, 538, 772 A.2d 507, 509 (2001) (mem.). "[W]e... give deference to the recommendation of the Hearing Panel," but we make our own determination as to which sanctions are appropriate. In re Blais, 174 Vt. 628, 630, 817 A.2d 1266, 1269 (2002) (mem.) (internal citations omitted).

The Court "must accept the Panel's findings of fact unless they are clearly erroneous." Id. at 629, 817 A.2d at 1269. There is no challenge to the facts as found by the Hearing Panel. *1028 ¶ 6. The Vermont Rules of Professional Conduct require that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." V.R.P.C. 1.3.

The definitions in the preamble to the rules state that the term "reasonable" when used in relation to conduct by a lawyer "denotes the conduct of a reasonably prudent and competent lawyer." The standard of proof for charges of misconduct is "clear and convincing evidence." A.O. 9, Rule 16(C).

Thus, the Panel was asked to find by clear and convincing evidence that a single instance of a missed appellate deadline was misconduct. The Panel held that "[a] single isolated act of negligence without any further acts compounding the error does not breach the standard of Rule 1.3." It reasoned that "[w]ere we to find a violation here, most attorney errors would be subject to the disciplinary system." ¶ 7.

In arriving at this conclusion, the Panel looked to two prior disciplinary rulings for guidance. The Panel first examined a case in which an attorney missed a child support hearing due to a calendaring error. In re PRB File No.2005.202, Decision No. 81 (Nov. 22, 2005).

In that case, the Panel found no prior disciplinary record, and no dishonest or selfish motive. The attorney made a full and free disclosure to Disciplinary Counsel and expressed remorse for her actions. In addition, the client suffered no injury because the client appeared at the hearing and requested and received a continuance. There, the Panel held that a single instance of inadvertence or negligence was not misconduct, absent further inappropriate conduct after the inadvertence or negligence.

Charges were dismissed. ¶ 8. The Panel also considered a case in which all of the difficulties in the case stemmed from one act of negligence. In re PRB File No.2005.191, Decision No. 90 (Mar. 17, 2006). In that case, the attorney, appearing pro hac vice, failed to file a notice of appearance, and so he did not receive notice of a crucial discovery-scheduling order.

As a result, he filed numerous untimely discovery requests which were all denied. The Panel found that the respondent knew a discovery order would be issued but made no effort to obtain a copy of the order and discover its contents within the discovery period. It was the attorney's failure to follow up on an order that he never received but should have known would be issued that changed the case from one of simple negligence into one of misconduct. ¶ 9.

In the case before us, the Panel found that a single isolated act of negligence did not constitute misconduct under the rules. We agree with manner in which the Panel balanced the attorney's conduct in this case against the public protection goals articulated by the Rules of Professional Conduct.

In general, the rules are "intended to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar." In re Berk, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991) (per curiam) (although Berk referred particularly to sanctions, it is clear that these are the overarching goals of the rules).

The respondent missed an important deadline, but he worked to remedy his error with the client and subsequent counsel. In the end, the client was afforded his appellate rights. Respondent's cooperation distinguishes his conduct from cases in which the Panel found misconduct based on failures to act. Further, there was no evidence that respondent attempted to evade or deny his error.

Cf. In re PRB File No.2004.062, Decision No. 68 (July 3, 2004) (attorney's negligence followed by a long period of inaction and a refusal to answer client's calls); In re PRB File No.2002.219, Decision No. 57 (July 7, 2003) *1029 (attorney's negligence was followed by eighteen months in which attorney failed to communicate with client); In re PRB File No.2003.183, Decision No. 56 (June 9, 2003) (attorney's failure to pay credit card bills immediately after a real estate closing prompted phone calls from client, and attorney did not take immediate action).

And, the Panel found respondent took remedial action after he discovered his negligence. Cf. In re Furlan, Decision No. 65 (May 5, 2004) (attorney's negligence in missing two court dates was

compounded by the fact that when the court ruled against his clients after failure to appear, he took no action because he believed the case had no merit). ¶ 10. This decision should not be read to excuse single negligent acts or omissions by attorneys in all situations.

Missing a filing deadline is never insignificant, but the availability of remedies to correct a mistake may tend to mitigate the seriousness of an error. The absence of an opportunity to cure a negligent misstep may render an error more serious and, depending on the circumstances, constitute misconduct even though isolated.

The Panel exercised its authority in reasonably balancing the competing interests in this case. We agree with the Panel that respondent's error was appropriately remedied through the post-conviction relief process, and none of the goals of attorney discipline would have been served by imposing discipline here. See *In re Blais*, 174 Vt. at 631, 817 A.2d at 1270 (goal of attorney discipline is to protect the public).

It is true that respondent has been disciplined once before, and we acknowledge that the concerns stated by the dissenting Panel member in this case are important. However, we agree with the Board's conclusion that respondent's actions did not rise to the level of misconduct.

To so hold would result in bringing all instances of an attorney's inadvertence or negligence within the realm of misconduct. We do not believe that the rule is this broad and far reaching. Attorneys are held to a high standard of conduct, but absent injury or other factors, a single mistake does not show a lack of reasonable diligence or promptness. Affirmed.